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In the

Supreme Court of the United States

OCTOBER TERM, 1963

1937

No. [redacted]

FRANK ROMANO, JOHN OTTIANO, EDWARD ROMANO,
ANTONIO VELLUCCI
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

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Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on March 25, 1964.

The opinion of the Court of Appeals (Lumbard, Chief Judge, Kaufman and Marshal, Circuit Judges) is thus far unreported and is reprinted in Petitioners' Appendix A. Petition for rehearing was denied on April 21, 1964, and the opinion thereon is reprinted in Petitioners' Appendix B. Opinions in a companion case are reported in 203 F. Supp. 27 (1962) and 202

F. Supp. 597. The full text of the pertinent opinions in the district court are set forth in the Appendix from the Court below, at pages 49a and 59a, nine copies of which are tendered pursuant to Rule 21(4) of this Court.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

STATEMENT OF THE CASE

The judgment of the Court of Appeals, from which Petitioners seek review, affirmed a judgment of conviction with respect to the Petitioners, Edward Romano and Antonio Vellucci, for a violation of Section 5601(a)(8) of Title 26 United States Code; and, with respect to all Petitioners, affirmed a judgment of conviction for a violation of Section 371 of Title 18 United States Code. The pertinent parts of the Section 5601(a)(8), the presumptions applicable thereunder under Section 5601 (b)(4) and Section 371 are set forth in Petitioners' Appendix C.

Upon the trial, all Defendants-Petitioners were convicted on all counts as charged and sentenced on June 29, 1962. (R. 829a-836a) Appeal was taken to the Court of Appeals for the Second Circuit; and that Court, on March 25, 1964, reversed the conviction of Frank Romano and John Ottiano on Counts 1 and 2; affirmed the conviction of Frank Romano and John Ottiano on Count 3 and affirmed the convictions of Edward Romano and Antonio Vellucci on Counts 2 and 3.

Defendant-Petitioners Frank Romano and John Ottiano were charged in a three count indictment, with a violation of § 5601 (a)(1) on the first count, § 5601(a)(8) on the Second Count and with conspiring, § 371, to violate § 5601(a)(8) in

the Third Count, Defendants-Petitioners Edward Romano and Antonio Vellucci were charged with a violation of Section 5601(a)(8) on the Second Count and with conspiring in violation of § 371, Title 18 to violate § 5601(a)(8) in the Third Count, the full pertinent text being set forth in Appendix C.

Thereafter, Petitioners were granted an extension of time within which to file a Petition for Rehearing, to April 14, 1964. Included in the Petition for a Rehearing was an application for a stay of the issuance of the mandate of that Court for thirty days pending a petition for certiorari to be filed in this Court. On April 21, 1964, the Court declined to rehear the case and denied the application to stay the issuance of its mandate. A copy of the opinion on the Petition for Rehearing is reprinted in Petitioners' Appendix B. Associate Justice Harlan extended the time to file this Petition to June 20, 1964.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining that the defendants, Edward Romano and Antonio Vellucci, lacked standing to complain about the search and seizure in this case; and, did the Court of Appeals err further in determining that a trespass by government agents upon property of a co-defendant in order to obtain the information upon which the search warrant was based was not an invasion of any constitutionally protected right of any of the defendants?

2. Did the Court of Appeals err in determining that once federal agents are issued a search warrant by a magistrate, thereafter, federal agents may destroy large portions of the items seized under the warrant without some application to the issuing Court and without any notice to any person who was found present; and, nonetheless, that the burden of showing prejudice by reason of the destruction rests upon the defendants?

3. Did the Court of Appeals err in refusing to determine that once the government elects to record testimony before a grand jury on a case that the government is obliged to record all of the testimony in connection with that case?

4. Did the Court of Appeals err in determining that the entire case report of the group supervisor, Nadel, containing in part the reports of other agents acting under his supervision, need not be produced after Nadel had testified where appropriate demand, under Title 18 United States Code, Section 3500, was made.

5. Did the Court of Appeals err in determining that an unconstitutional charge of a presumption of guilt is not substantial error where the jury could have relied upon that charge to find guilt on any count?

REASONS FOR ALLOWANCE OF THE WRIT
STATEMENT OF FACTS

On October 10, 1960, Agents Mortimer Nadel and Samuel Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with Officer Donald Harris of the Connecticut State Police, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. The purpose of this visit was to attempt to verify certain information concerning an alleged violation of the revenue laws taking place on the premises.

"Aspinook Mill" is a large complex of industrial buildings covering a number of acres of land. Parts of the complex had been and were occupied by tenants. There was an entrance to the property; and, beyond the entrance, two roadways were available for access to all of the buildings. One of these roadways ran along the river that bordered the property on the west. The other ran toward the railroad tracks that bordered

the property on the east. The northerly side of the mill was bordered by the river and by a hydro-electric spillway. The entrance gate was on the southerly side of the property.

The three agents proceeded along the easterly boundary of the property with Officer Harris of the State Police acting as the guide. There was a fence along this part of the property and as the three agents walked along the outside of the fence they came upon an aperture through which they gained entry into the "Aspinook Mill" property. This property was owned by the Griswold Corporation, a duly organized and existing Connecticut corporation; and a defendant in this criminal prosecution. At the conclusion of the Government case Griswold Corporation and Samuel I. Cohen were discharged on motion of their counsel. No permission for this entry was requested and none was granted. (R. 133a)

The intelligence available to the federal agents indicated that there was an illegal distilling apparatus located in the extreme northwesterly corner of the industrial complex previously described. (R. 24a)* After gaining entry through the hole in the fence, the three agents then proceeded, under the cover of darkness, through a series of buildings until they were in the so-called paint shop area. This scouting expedition took place between 10:30 and 11:00 p.m. At this point, from a concealed position in the buildings, the agents could detect the odor of fermenting mash. (R. 130a) The building in which they detected the odor of fermenting mash was located in the extreme northwest corner of the complex and all of its windows had been covered with some substance that prevented light from showing on the outside at night.

Earlier, other agents of the Alcohol Tax group set up an observation position on high ground across the river from the

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* References are to Appendix Pages.

"Mill" site. Apparently all of the windows were not covered because Agent Shaw, using a high powered set of binoculars, made observations of the interior of the building through what was apparently a single unpainted or uncovered pane of glass. From these observations, Agent Shaw made an affidavit that there appeared to be equipment in the building that could be used for distilling purposes. (R. 22a) On the basis of the observations made through the binoculars and the entry on the "Mill" premises on the night of October 10, two agents, Shaw and Sushman, prepared affidavits that were the basis for the issuance of a search warrant for the northwest corner building. The warrant was issued and directed the agents to search and seize specific items forthwith. (R. 26a-27a)

On October 13, 1960 at 7:30 a.m. a group of agents and officers of the Connecticut State Police went to the "Aspinook Mill" and entered the described premises. On the premises they found the defendant, Frank Romano, and the defendant, John Ottiano. They also found a large capacity still. The evidence indicated the still had been in operation for about four days. Ottiano had arrived at the premises in a pick-up truck that had been purchased around September 14, 1960, in Providence, Rhode Island by the defendant, Antonio Vellucci.

About one hour after the agents gained access into the "still premises" the defendants, Frank Romano and John Ottiano, were taken to the State Police Troop at Colchester, Connecticut. Later, on October 13, 1960, Agent Sushman and others took both of these men to New Haven for presentation before Judge Timbers for a preliminary hearing and setting of bond.

When the two defendants, found on the premises, were removed, the inventory had not been completed. They were never given a copy of the inventory. The senior agent, Mortimer Nadel, after some time had been spent taking photographs, gave directions that certain of the items should be destroyed.

At a subsequent hearing the Government presented an itemized list of the items destroyed at the direction of the government agents. At no time, however, was there any request for the permission of the Court to destroy any of the items seized under the authority of the search warrant. (R. 347a)

On December 1, 1960, each of the defendants in this appeal, together with others, were indicted by a grand jury sitting in New Haven. In addition to the defendants herein, the Griswold Corporation and one of its officers, Samuel I. Cohen, were named as co-defendants along with a number of John Does.

After pleas of not guilty had been entered, the defendants filed motions that were the subject of hearings by the district court. One of these motions was for discovery, under Rule 16, Federal Rules of Criminal Procedure, of the items taken by seizure or by process from the defendants, Frank Romano and John Ottiano. The Court granted this motion. After the Rule 16 motion was granted, counsel for the appellants made two attempts to see the items taken by the search warrant. The Government claimed that the Court order was limited to the items taken from the persons of Frank Romano and John Ottiano. As a result of this position, defense counsel requested that the Court issue an order compelling compliance with the order previously entered. At the hearing scheduled on this point, it was disclosed, for the first time, that compliance was not possible because the Government had destroyed a great deal of the items seized. (R. 347a, 376a-377a) Defendants, thereupon, made a motion to dismiss the prosecution on the grounds that the Government had elected to destroy evidence. This motion was scheduled for a subsequent hearing and was denied. (R. 59a)

Defendants also made a motion, under Rule 41 of the Federal Rules of Criminal Procedure, to supress the evidence seized under the warrant issued in October of 1960, upon the grounds

that the warrant was based upon an illegal entry of the premises and upon the ground that the warrant was not properly executed in that the search and inventory was not made in the presence of two of the defendants found on the premises. This motion was denied with leave to raise it at the time of trial. Prior to the trial, other motions were made to the Court by other defendants; and they were afforded a hearing, before trial. When the defendants herein renewed the motions, the rulings on the motions of other defendants was applied to the appellants' motions. The jury trial began on May 1, 1962, and 31 days later the jury returned a verdict of guilty on each count with respect to each defendant-appellant.

During the trial, it developed that the Government agents had found a large distilling apparatus in operation on the premises. The Government offered evidence which showed that there were certain glass jars of a type distributed by a Connecticut representative of the Knox Glass Company found on the premises. The president of the distributor testified that he had sold jugs of this type to two men whom he identified as Frank Romano and Edward Romano. The witness also testified that they were operating a Ford pick-up with a rack body of the same type and year as that found on the still premises on the morning of the raid. Another witness testified that he was directed by his employer to deliver some truck loads of sugar to a location outside of Providence, Rhode Island. The person who met him drove away with the truck and returned about an hour and a half later with the truck empty. The time just to travel from Providence to Jewett City and back was estimated well in excess of this time. The type of sugar was 60 lb. bags of Domino Brand sugar. Neither of the Government witnesses was able to state with certainty that the glass jugs or the empty or full sugar bags found in Jewett City were the same as those sold some time earlier. On the "still premises"

the Government produced photographs of a commode and a shield, apparently of plywood, segregating the lavatory from the rest of the premises. (R. 715a-717a)

Later the Government produced a witness who indicated that at some indeterminate date in September, 1960, he saw the defendant, Ottiano, and the defendant, Edward Romano, in a building on the extreme southerly part of the industrial complex. The witness stated that these two men were looking for a piece of plywood and the commode. The witness stated that he called Providence to obtain permission to let them take it. There was no evidence that Antonio Velluzzi had ever been in Jewett City and specifically there was no evidence that he had ever been on the "Aspinook Mill" premises.

The chief witness for the Government was Agent Mortimer Nadel. He was the group supervisor. This agent, in addition to directing the activities of the investigation before and after October 13, 1960, prepared the report of the investigation. This report was made up, in part, by his own observations and in part by the reports of the other agents. The defendants made a demand, at the end of the direct testimony that the entire report of this witness be made available under Section 3500 of Title 18. This would have included not only the written report of Mr. Nadel, but the written reports of all of the agents working under him. The defendants claimed that he adopted and approved these reports by submitting the report to his superior, the witness, Norton. In addition, the defendants demanded that the Government produce all of the grand jury transcript of the testimony, not only of this witness, but of all other witnesses that it expected to call, to the Court. It appears from the status of the record that the Government elected to take the testimony of certain witnesses before the Grand Jury and to exclude the testimony of others. The entire report of agent Nadel was not produced while he was on the stand

available for cross-examination. In addition, the defendants claim that the Government had an obligation to have the testimony of all of the witnesses transcribed, and that under Rule 6 it could not select those witnesses that it would record stenographically and exclude others. The Government produced only that which it could find and could not explain adequately why others were not transcribed or why it was not taken, or with exactitude if it was taken.

At later stages of the trial, some of the agents who made reports concerning the activity before, during, and after October 13, 1960, were called as witnesses. It is true, at the conclusion of their testimony, their reports were delivered to defense counsel.

AS TO THE FIRST QUESTION PRESENTED

Did Edward Romano And Antonio Vellucci Lack Standing To Complain Of The Unreasonable Search And Seizure; And Whether A Simple Trespass By Government Agents Upon Property Of A Co-Defendant To Obtain The Information Necessary For A Search Warrant Was Not An Invasion Of A Constitutionally Protected Right?

Petitioners' claim that the evidence obtained on October 13, 1960 should have been suppressed because of the illegal search conducted on October 10th was disposed of by the Court below upon the following grounds:

a. Petitioners lacked standing;

b. The search warrant was not directed specifically against these petitioners;

c. Possession was not an element of the crime with which the Petitioners were charged;

d. Even if Petitioners had standing, the action on October 10th was a simple trespass and does not constitute an illegal search.

A. Standing.

The import of *Jones* vs. *United States,* 362 U.S. 257 (1960) was to remove the restrictive and narrow interpretation given the concept of "standing" by the lower Courts. It is submitted that since the five years of the *Jones* case, *supra,* the Courts have not met the direction and import of that decision.

The *Jones* case, *supra,* eliminated the requirement that proof of a possessory interest be a pre-requisite to any defendant moving for the suppression of evidence. Prior to *Jones,* it was necessary to show ownership or the interest of a licensee or invitee, or some other interest involving dominion. *Jones* cut the thread of these decisions totally. If *Jones* is to stand for anything it must be for the proposition that the alleged use of the premises by the defendant confers standing, and permits the defendant to invoke the privacy of the premises searched once the defendant makes a legitimate use of the premises.

There arises the inevitable definition of a legitimate use; and, in the ordinary sense of that phrase, this would exclude an illicit distillery. In *Jones,* however, the defendant was using the apartment of another to secrete narcotics. Despite this, this Court found the defendant "legitimately" on the premises. The principle appears to be clear that where the owner or lessee of the premises gives another permission to use the premises, that permission makes the use "legitimate" and confers upon the user the benefit of privacy in the premises and thereby brings the user within the ambit of the protection of the Fourth Amendment. Petitioners contend that some person or persons having obtained the permission of the co-defendant, Griswold Corporation, for the use of the premises, and absent any show-

ing that such presence was criminal as to Griswold Corporation, Petitioners, Edward Romano and Antonio Vellucci, did have standing.

In addition, the federal courts have set up the proposition that there exists an inter relation between prejudicial effect and standing. In *Hair* vs. *United States*, 289 F.2d 894 (D.C. Cir. 1961) the Court said that where the admission of the evidence would sufficiently prejudice the interest of a co-defendant, in effect it warranted standing to the co-defendant citing *McDonald* vs. *United States*, 335 U.S. 451 (1948). Thus, standing must be equated against the posture of the total prosecution and where, as here, the Petitioners are charged as conspirators with the title owners and with "John Does," standing to suppress must be found to exist.

B. The Search Warrant Was Not Directed Specifically Against The Petitioners.

Generally speaking, search warrants are not directed at persons but at places or premises. In the affidavits of the investigating agents, all of the Petitioners are mentioned. (R. 22a-25a) As *Jones* vs. *United States, supra*, pointed out, when the warrant was directed to a place where the defendant was an occupant, regardless of how temporary, sufficient "standing" exists. It is clear from the evidence that all of the accused were claimed to have been present at some time prior to the execution of the warrant. Frank Romano and John Ottiano were found there on the morning of the raid. (R. 67a) Edward Romano and John Ottiano were claimed to have been present at a time when the illicit still was being assembled. (R. 715a-717a) Antonio Vellucci, while never shown to be actually present is claimed to be constructively present by means of the truck registered in his name. (R. 25a) The Court should have found a sufficient possessory interest through this

item alone to confer standing on Vellucci. Still, contrary to the clear import of the *Jones* case, the Court found that there existed no prejudice since the warrant was not directed at them. Petitioners believe that where the scope of the Constitutional protection extends to an interest, this factor supersedes the specific direction. Directing a search warrant at one person or place does not limit the constitutional guarantees to that person but must leave intact those guarantees with respect to all persons within the ambit of the search. *Wong Sun* vs. *United States*, 371 U.S. 471 (1963).

C. Possession Was Not An Element Of The Crime With Which The Petitioners Are Charged.

The Court below determined that since Edward Romano and Antonio Vellucci were not charged with possession of the illicit distillery, they were not in the predicament that the *Jones* case, *supra*, sought to remedy. This reverses the entire thrust of the decision in *Jones* by limiting its application to cases in which the defendant is charged with illegal possession. The following language from *Jones* vs. *United States, supra*, at 263 points up the error:

> "(2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the Court below."

D. Even If The Petitioners Had Standing, The Action Of October 10 Was A Simple Trespass And Does Not Constitute An Illegal Search.

Assuming "arguendo" that all of the Petitioners have standing, the Court below reasoned that the evidence was not rendered inadmissible merely because it was obtained by the

simple trespass. (R. 65a-66a) Both Courts below cited *Hester* vs. *United States*, 265 U.S. 57 (1924) as authority for the proposition that a mere trespass by the government is not sufficient to render the search and seizure illegal as exploratory. There are apparently two existing hypotheses. The first, *Hester* vs. *United States, supra,* makes the trespass a nullity. The trespass as a necessity is expressed in a number of cases: *Goldman* vs. *United States*, 316 U.S. 129 (1942); *Silverman* vs. *United States*, 365 U.S. 505 (1961); *On Lee* vs. *United States*, 343 U.S. at 751-752 (1952) where the decision turned upon the fact that "no trespass was committed," *Ibid.* Petitioners submit that the *Hester* case, *supra*, has been misconstrued since there existed in that case a clear act of abandonment in an open field. This makes that case clearly distinguishable from the case at bar. If there are two theories, which if they exist Petitioners submit are in conflict with one another, this Court should determine and decide between them.

(1) *The Derivative Trespass*:

The *Jones* case, *supra,* and the *McDonald* case, *supra,* reflect a determination that finite definitions developed by the common law are not the ultimate limitation upon constitutional guarantees. Both of these cases have extended the area of protection of the Fourth Amendment notwithstanding the defendants' lack of a common law property interest thereby creating a theory of derivative standing. In the "nullity theory" cases, the defendant is usually an occupant of the premises owned by another. *Hester* vs. *United States, supra; Gracie* vs. *United States*, 15 F.2d 644 (1st Cir. 1926). The reasoning in these cases must be based upon a *pre-Jones* concept of "standing," since there is no trespass to the defendant's property. Petitioners submit that such a concept places too great a restriction upon the protection afforded by the Fourth Amendment, limiting the protection to persons only in relation to some interest in

property. Petitioners submit that such a limitation denudes the individual while cloaking the property. Clearly, the open field theory weighed heavily in the decision by both the district court and the Court of Appeals. These Courts found the trespass not to constitute an unreasonable search and not to have affected a protected area. Petitioners submit that the *Jones* case and others do not limit the constitutional guarantee to houses or specific common law interests in land. *Cf. Lustig* vs. *United States*, 338 U.S. 74 (1949) covering a hotel room; *Gambino* vs. *United States*, 275 U.S. 310 (1927), *Henry* vs. *United States*, 361 U.S. 98 (1959), an automobile; *Rios* vs. *United States*, 364 U.S. 253 (1960), an occupied taxicab; and *Lanza* vs. *New York*, 370 U.S. 139 (1962), a jailhouse. The facts here show that the "verification — investigative" party passed through a series of interconnected buildings owned by a co-defendant to a point where the officers made the observations necessary to prepare the foundation affidavits. (R. 132a-133a) That it was an investigatory or exploratory intrusion is not in dispute and it is clear that no permission was asked or granted. In other words, federal agents made a physical invasion of the co-defendant's property for the express purpose of making observations of another area of the same co-defendant's property, without any preceding act of abandonment as in *Hester, supra.* It would seem that if one invades one area that is protected and then observes by his senses activity in another area physically connected to the area invaded, he is in no position to claim simple trespass, especially since there existed an alternative route, *i.e.* the river from which point all of these observations could have been made without the physical invasion.

AS TO THE SECOND QUESTION PRESENTED.

ONCE FEDERAL AGENTS ARE ISSUED A SEARCH WARRANT BY A MAGISTRATE, THEREAFTER, MAY FEDERAL AGENTS DESTROY LARGE PORTIONS OF THE ITEMS SEIZED UNDER THE SEARCH WARRANT WITHOUT SOME APPLICATION TO THE ISSUING COURT AND WITHOUT ANY NOTICE TO ANY PERSON WHO WAS FOUND PRESENT; AND, IS THE BURDEN OF SHOWING PREJUDICE BY REASON OF THE DESTRUCTION IMPOSED UPON THE DEFENDANT.

There exists no dispute that there was an opportunity to advise the district court of the circumstances of the seizure in the case at Bar. The record reflects (R. 67a) that one of the agents to whom the search warrant was issued appeared before the Court on the afternoon of the "raid". No mention of the destruction was made until five months later, and then only after the defense moved to compel disclosure pursuant to the order made under Rule 16 in February.

In *United States* vs. *Consolidated Laundries Corp.*, 291 F.2d 563 (2 Cir. 1961), the Government failed to produce certain documents. When the defense raised objection the trial court held that the defendants "failed to prove that they were materially handicapped as a result of the absence of the papers," and that the documents would not have affected the determination of the defendants' guilt.

The Second Circuit stated that it was impossible to know whether the result of the trial would have been different if defense counsel had the documents. *Ibid* at 570. The Court went on to say that a negligent suppression of material evidence by the Government entitles the defendant to a new trial, citing *United States* vs. *Heath*, 260 F.2d 623 (9. Cir. 1958) where the Government lost items claimed by the defense to

have evidential value. While the Court based its reversal in the *Consolidated* case *supra* upon the supervisory power of Appellate Courts over the administration of criminal justice, *Id* at 571, Petitioners submit that any unilateral decision by federal agents acting under and by authority of a search warrant, to destroy material portions of the seizure — and in the instant case large portions, violates so fundamental a principle of fairness as to amount to a denial of due process of law. In the case at Bar, both Courts below discounted the defense contention because the defense was unable to show how they were prejudiced. This means that the burden has been shifted to the defense to show that the outcome of the trial would have been different had the items not been effectively removed by the decision of the agents to destroy. Such a showing is impossible. This impossibility was effectively recognized in the *Consolidated* case, *supra,* when the Second Circuit pointed out that the evidence suppressed—wilfully or negligently — need only be material. Petitioners submit that there was nothing more material in this case than the total instrumentality necessary to commit the criminal violation — the entire still.

Petitioners would also point out that there exists an apparent conflict between the decision in the *Consolidated* case, *supra,* and *Ramsey* vs. *United States,* 245 F.2d 295 (9 Cir. 1957)

The *Ramsey* case holds that wilfull destruction does not constitute a proper basis for error. It seems almost fundamental that there should exist a double standard in federal criminal cases — as appears from the decisions of *Heath* vs. *United States* and *United States* vs. *Consolidated Laundries, supra* on the one hand and *Ramsey* vs. *United States, supra,* and the holding below, on the other.

AS TO THE THIRD QUESTION PRESENTED.

Once The Government Elects To Record Testimony Before A Grand Jury On A Case, The Government Is Obliged To Record All Of The Testimony In Connection With That Case.

It cannot be disputed that there exists a wide difference of approach, even within circuits, about the taking of stenographic notes of grand jury proceedings. Recently, the Supreme Court decided that once trial began the entire transcription of the grand jury testimony taken stenographically should be made and held available.

The issue in the instant case is somewhat different. In this case there was a stenographer present during some of the grand jury proceedings and that portion of the testimony for which notes could be found was transcribed. (R. 298a, 305a, 307a, 352a, 361a, 586a)

It is also clear from the record that there exists a doubt concerning two factors, either of which require dismissal. First, why was not all of the testimony transcribed and second, why was there no clear cut record of the stenographic notes being held under seal in the clerk's office?

This Court has not yet decided whether the proceedings of a Grand Jury are so much a part of the judicial process instituted against an accused that a record of those proceedings is required to be preserved.

> ". . . (A) ny criminal prosecution is inherently unfair to the defendant, semantic presumptions of innocence notwithstanding. The defendant . . . is being accused of a crime against the community, an assault upon the status quo. The plaintiff is the People. The complaint doesn't contain vague allegations drawn by some lawyer trying to

> earn a fee, but is an indictment returned by a grand jury. Plaintiff's counsel is no unknown attorney, but the public prosecutor. 'Accused,' 'crime,' 'grand jury,' 'indictment,' 'district attorney,' 'people' — these are words that evoke an emotional response. All of the majesty of the law, all of the dignity of the prosecutor's office, all of the outrage of the community, is working to the prejudice of the defendant."
>
> Polstein, *"How to 'Settle' a Criminal Case"*, 8 Prac. Law, 35, 43.

Confronted with such a problem the accused needs all of the ammunition he can load into the breach of defense. One "round of ammunition" importantly consists of his right to move to dismiss an indictment.

However, the defendant, before trial, is unable to make such a motion unless he knows the basis for the issuance of the indictment. This basis lies with the Grand Jury.

Let us, by analogy, compare the cases in which the defense requests an inspection of the grand jury minutes at the trial. The Second Circuit takes the approach that an in-camera inspection is mandatory. *United States* vs. *Spangelet*, 258 F.2d 338 (2 Cir. 1958); *United States* vs. *Giampa*, 290 F.2d 83 (2 Cir. 1961). In *United States* vs. *Zborowski*, 271 F.2d 661 (2 Cir. 1959), the Court pointed out that the request for an in-camera inspection should be granted even when there is no showing of an inconsistency in the testimony; the Court, giving as its reason, the fact that "it offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the trial judge."

In *United States* vs. *Hernandez*, 290 F.2d 86, 88 (2 Cir. 1961), the Court said that to require the defense to point out inconsistencies before granting the motion for an in-camera inspection would be a self-defeating condition. "For neither

defendant nor his counsel has the grand jury minutes (indeed the request would not be made if they had them at hand); and, to require a bill of particulars in support of the request when from the nature of the situation counsel cannot know such details is to deny the rule itself." *Ibid.*

The defense is confronted with a similar self-defeating condition to its pre-trial motion to dismiss the indictment. If valid grounds exist, and in the case at bar there is every reason to surmise that they exist, the defendant is helpless because the Court will not grant the motion on surmise. The Government, therefore, can effectively thwart any motion directed at the indictment, other than to its content, by simply "neglecting" to record the Grand Jury proceeding.

> "The regularity of grand jury proceedings in the federal system is presumed and the burden of proving regularity does not shift to the government merely because the defendant makes unsupported claims on a motion attacking the indictment."
>
> *United States* vs. *Greenberg*, 204 F. Supp. 400, 402 (D.C. S.D.N.Y. 1962);
>
> *United States* vs. *Johnson*, 319 U.S. 503 (1943).

How can the defendant support its motion to dismiss the indictment when there is not a record to affirm his reasons for attacking the indictment?

> "It can hardly be doubted that it is conducive to more even justice that the testimony of grand jury witnesses be recorded for the knowledge of the witness that his words may thereafter appear against him is calculated to produce the truth from his lips and it is conceivably of benefit to the accused and the witnesses as well."
>
> *United States* vs. *Weathers*, 21 F. Supp. 763 (D.C.N.D. Ga. 1937).

AS TO THE FOURTH QUESTION PRESENTED.

MUST THE GOVERNMENT PRODUCE THE ENTIRE CASE REPORT OF THE GROUP SUPERVISOR, NADEL, WHEN THIS REPORT CONTAINS REPORTS OF OTHER AGENTS ACTING UNDER HIS SUPERVISION WHEN APPROPRIATE DEMAND UNDER TITLE 18, UNITED STATES CODE, SECTION 3500, WAS MADE?

The Court below determined that there was no showing of adoption or approval of the reports of other agents covering the subject matter of the raid. The Petitioners assert that such a conclusion involves a semantical act of gymnastics to obviate the clear import of sub-section (e) of Section 3500. The record reflects that Nadel prepared, signed, and forwarded the prosecutive report to the United States Attorney, and this is the necessary adoption referred to in *Rosenberg* vs. *United States*, 360 U.S. 367 (1959). (R. 281a, 282a, 322a-323a, 448a-449a, 516a-523a). It is also clear that the report contained the information that Nadel felt was probative from an investigatory view including a number of reports of others covering the subject matter Nadel covered on direct. In that sense, to say the least, it was material and relevant to his direct and should have been delivered up to the Court. It is also clear that such a tender was made only after repeated defense insistence; and, even then, reluctantly.

It is not necessary that Nadel sign the "other statements" in order that they be adopted or approved by him.

Bergman vs. *United States*, 253 F.2d 933 at 935 (6 Cir. 1958);

United States vs. *Tomaiolo*, 280 F.2d 411, 413 (2 Cir. 1960).

Such production is also not limited to the witness's own statement. In order for it to be produced, it can be someone other than the witness who prepared the statement. It merely must be related to the subject matter of the direct and adopted or approved by the witness.

Clancy vs. *United States*, 365 U.S. 312 (1961);
Campbell vs. *United States*, 365 U.S. 85 (1961).

In addition, Petitioners assert that the language of the statute is mandatory, leaving no discretion open to the Court if the prosecution fails to comply with the Statute upon appropriate demand. The Court below insists that the Petitioners were not prejudiced. It is asserted that prejudice follows from non compliance with the statute and a subsequent "protection" ruling by the trial court does not remove the prejudice. It is not for the defense to show any absence of prejudice. It would now appear that there is a conflict between the Third Circuit, *United States* vs. *Prince*, 264 F.2d 850 (3 Cir. 1959) and the Sixth Circuit *Lohman* vs. *United States*, 251 F.2d 951 (6 Cir. 1958) which find that prejudicial error exists when the Government fails to comply; and, the Second Circuit, in the case at Bar, which holds that even if the error was committed, it can be reformed by "making the investigator available to testify for the defense" at some later point in the trial. No such avenue exists in the statute; and, failure to comply, when demand is made, should constitute reversible error in all circuits.

AS TO THE FIFTH QUESTION PRESENTED.

DID THE COURT OF APPEALS ERR IN DETERMINING THAT AN UNCONSTITUTIONAL CHARGE TO THE JURY CONCERNING A PRESUMPTION OF GUILT IS NOT SUBSTANTIAL ERROR WHERE THE JURY COULD HAVE RELIED UPON THAT CHARGE TO FIND GUILT ON ANY COUNT.

The Court of Appeals found that the statutory presumptions of Section 5601(b)(4) Appendix B, *infra*, "fall outside of the constitutional power of Congress." This, under the earliest of Supreme Court decisions, gives rise to the claim that Section 5601(b)(4) is void and its passage a nullity.

Marbury vs. *Madison*, 1 Cranch 137 (1803);
United States vs. *Harris*, 106 U.S. 629 (1882).

This being properly founded upon the logic that any statute enacted by Congress must yield to the paramount and Supreme Law of the Constitution.

United States vs. *Wong Kim Ark*, 169 U.S. 649 (1898).

In the instant case the Court specifically gave the jury a charge under the provisions of Section 5601(b)(4) *infra*. The defense took exception to the charge upon constitutional grounds before the charge was made, and thereafter, specifically requested the trial court to instruct the jury that the presumption could not apply to the defendants, Edward Romano and Antonio Vellucci. The Court declined — leaving it by such refusal, for the jury to determine as a question of fact whether or not the presumption applied. In addition, the defendants specifically requested the Court to charge that the presumption of guilt could not be used by the jury to find guilt on the charge of conspiracy. The trial court refused. It is submitted that the jury could well have misconstrued the

charge and based the conviction upon the presumption on the conspiracy count.

In this posture, we start with the basic premise of an instruction based upon a statute declared to be void by reason of its unconstitutional character.

The Supreme Court has said that where the verdict of guilty did not specify the ground upon which it rested and the jury had been instructed that their verdict might rest upon a statutory provision that is determined to be unconstitutional, the conviction must be set aside.

Stromberg vs. *California*, 283 U.S. 359 (1931);
Williams vs. *North Carolina*, 317 U.S. 287 (1942);
Yates vs. *United States*, 354 U.S. 298 (1957);
Terminiello vs. *Chicago*, 337 U.S. 1 (1949).

Even where there are two separate bases for a verdict of guilty, one of which is invalid under the constitution, the verdict should be set aside.

Musser vs. *Utah*, 333 U.S. 95 (1948) (dissenting opinion).

It seems clear that the Supreme Court has effectively stated that where a constitutionally protected right is invaded in a criminal proceeding, it cannot be defined as harmless error.

State vs. *Fahy*, 84 S. Ct. 229, — U. S. —, (1963).

It would seem proper, therefore, for this Court to set forth with clarity, if there is a grave doubt whether the error had a substantial influence in bringing about a verdict of guilty.

Krulewitch vs. *United States*, 336 U.S. 440 (1949).

It is submitted where the Court charges upon an unconstitutional presumption and leaves it to the jury to determine whether the presumption should apply that a grave doubt must exist.

CONCLUSION.

1. Each of the questions presented herein poses important questions of Federal Criminal Law that should be decided by this Court.

2. The decision below on question 5 concerning the Court's charge is in conflict with the conclusions in *Barrett* vs. *United States*, 322 F.2d 295 (5 Cir. 1963) *cert. granted*, 375 U.S. 962 concerning the speculative effect upon a jury from the use of an unconstitutional charge.

The writ of certiorari should be granted.

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